CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM ~~1923~~ 1924

No. ~~504~~ 194

C. V. BROWNE, PETITIONER

vs.

THE UNION PACIFIC RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

PETITION FOR CERTIORARI FILED OCTOBER 8, 1923

CERTIORARI GRANTED NOVEMBER 26, 1923

(28,904)

(29,904)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 594

C. V. BROWNE, PETITIONER,

vs.

THE UNION PACIFIC RAILROAD COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

INDEX

	Original	Print
Proceedings in supreme court of Kansas	1	1
Caption	1	1
Record from district court of Shawnee County	2	1
Notice of appeal	2	1
Journal entry of judgment	3	1
Clerk's certificate	4	2
Appellant's abstract of record	6	3
Petition	6	3
Notations as to Exhibits A and B to petition	15	8
Exhibit C to Petition—Letter, Browne Grain Co. to Gladney Milling Co., March 18, 1921	16	9
Answer	16	9
Motion to strike	20	12
Demurrer to answer	20	12
Journal entry of judgment (omitted in printing)	21	12

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 16, 1923

	Original	Print
Notice of appeal.....(omitted in printing)..	22	13
Certificate of counsel.....	22	13
Specifications of error.....	23	13
Appellee's counter abstract of record.....	26	13
Plaintiff's Exhibit A—Letter, Ed Past Grain Co. to Browne Grain Co., October 18, 1920.....	26	13
Plaintiff's Exhibit B—Letter, Gladney Milling Co. to Browne Grain Co., October 30, 1920.....	28	14
Argument and submission.....	31	15
Judgment	33	15
Opinion, Dawson, J.....	35	16
Dissenting opinion, Harvey, J.....	40	20
Petition for rehearing.....	43	20
Order overruling petition for rehearing.....	51	26
Clerk's certificate.....	52	26
Order granting certiorari.....	53	27

[fol. 1] IN THE

SUPREME COURT OF THE STATE OF KANSAS

No. 24605

C. V. BROWNE, Appellant,

vs.

THE UNION PACIFIC RAILROAD COMPANY, Appellee

Be it remembered, that on the 26th day of August, 1922 there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, a Notice of Appeal and Transcript of the Journal Entry of Judgment, of the District Court of Shawnee County, Kansas, in the words and figures as follows, to-wit:

[fol. 2] IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS

[Title omitted]

NOTICE OF APPEAL—Filed Aug. 14, 1922

To the Union Pacific Railroad Company and to Blair & Lillard, its attorneys of record, and to the Clerk of the above entitled court:

You and each of you will herewith take notice that C. V. Browne plaintiff herein, appeals to the Supreme Court of the State of Kansas from the orders herein made on July 15th 1922, overruling plaintiff's motion to strike certain parts from defendant's answer and overruling plaintiff's demurrer to defendant's answer and to certain parts thereof and rendering judgment against plaintiff and in favor of defendant for costs.

Campbell & Campbell, Attorneys for Plaintiff.

Service of the foregoing notice acknowledged as made on us this 14th day of August, 1922.

R. W. Blair, T. M. Lillard, O. B. Eidson, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 3] IN DISTRICT COURT OF SHAWNEE COUNTY

JOURNAL ENTRY OF JUDGMENT

And now on this 3rd day of July, 1922, the regular term day of this court, this matter comes regularly on for hearing upon the motion of plaintiff to strike parts from defendant's answer and upon

the demurrer of plaintiff to defendant's answer, plaintiff being present by Campbell & Campbell, his attorneys and defendant being present by R. W. Blair and O. B. Eidson, its attorneys.

After oral argument the court takes said matter under consideration, And now on this 15th day of July, 1922, the court finds that said motion of plaintiff should be overruled, and that said demurrer of plaintiff should be overruled.

Whereupon, plaintiff announces that he will stand on his demurrer to defendant's answer. Whereupon upon motion of defendant the court finds that defendant should have judgment for its costs herein.

It is now therefore, ordered, adjudged and decreed, that the motion of the plaintiff to strike certain parts from defendant's answer should be and the same is hereby overruled and, plaintiff having elected to stand on his said demurrer, that defendant should have and it is hereby given judgment against the plaintiff for the costs of this action.

O. K. Campbell & Campbell, Attorneys for plaintiff. O. K. R. W. Blair, T. M. Lillard, O. B. Eidson, Attorneys for defendant.

[fols. 4 & 5] STATE OF KANSAS,
Shawnee County, ss:

CLERK'S CERTIFICATE

I, W. E. Anderson, Clerk of the District Court within and for the County and State aforesaid, do hereby certify that the above and foregoing is a full, true and correct copy of Notice of Appeal Filed August, 14, 1922 Acknowledgement of service of Notice of Appeal, Journal Entry of Trial and Judgment, in case No. 34902, C. V. Browne vs. The Union Pacific Railroad Company, in the above entitled cause, as the same appears on file and of record in my office.

Witness my hand and seal of said court, hereunto affixed at my office in the city of Topeka, this 25th day of August, 1922.

W. E. Anderson, Clerk.

[File endorsement omitted.]

[fol. 6] IN THE SUPREME COURT OF KANSAS

No. 24605

[Title omitted]

APPEAL FROM DISTRICT COURT OF SHAWNEE COUNTY

Hon. George H. Whitcomb, Judge

ABSTRACT OF APPELLANT—Filed April 14, 1923

Plaintiff's petition filed on April 7, 1922, as amended, is as follows:

PETITION—Filed April 7, 1922

Plaintiff for cause of action against defendant, alleges:

1. That he is a resident of McKinney, Texas, where at all times hereinafter mentioned he has been engaged in the wholesale grain business and in the purchase and sale of wheat in car lots under the name and style of The Browne Grain Company.

That defendant is a corporation and a common carrier engaged in the business of operating a railroad and of transporting merchandise [fol. 7] for hire in and through Shawnee County, Kansas and between Kansas and other states.

That at all times hereinafter mentioned the Ed Past Grain Company was engaged in the wholesale business at Denver, Colorado, and The Gladney Milling was engaged in the grain and milling business at Sherman, Texas.

2. That on October 18, 1920, plaintiff purchased of the Ed Past Grain Company of Denver, Colorado, through the Kansas City Brokerage Company, 10,000 bushels of No. 2 soft white wheat at $2.36 per bushel basis delivered Group I Texas, Government scale of discounts for lower grades, time of shipment fifteen days or by November 2, 1920, billing instructions to follow, said wheat to be settled for on destination weights and official grades. Copy of his purchase contract with Ed Past Grain Company is hereto attached as Exhibit "A." That thereafter plaintiff requested said Ed Past Grain Company to bill said wheat to Whitewright, Texas, c/o Union Pacific Railroad Company, c/o Missouri, Kansas & Texas Railroad Company at Junction City, Kansas, and plaintiff extended time of shipment of said wheat under such purchase to November 9, 1920.

That on October 30, 1920, plaintiff sold to The Gladney Milling Company of Sherman, Texas, 5,000 bushels of said No. 2 white wheat at $2.40 per bushel basis delivered Group I Texas, Sherman official weights and grade to govern settlement, shipment to be made in ten days or by November 9, 1920, said wheat to be billed to Sherman, Texas. Copy of his sale contract to Gladney Milling Company is hereto attached as Exhibit "B."

[fol. 8] 3. That according to the usage and custom of the grain business, well known to defendant, and to the Ed Past Grain Com-

pany and to the Gladney Milling Company, time of shipment of grain in car lots is determined by the date appearing on the bills of lading on which the carrier received such car of grain for transportation and grain on contract is delivered by tendering a properly endorsed order bill of lading attached to the seller's draft on the buyer for the estimated price of such car of grain, such order bill of lading being delivered to the buyer upon payment of such draft.

4. That thereafter there was presented to plaintiff by a bank at McKinney, Texas, four sight drafts drawn by Ed Past Grain Company to which were attached order bills of lading properly endorsed showing shipment by the Ed Past Grain Company and receipt by defendant of four cars of wheat, billed to Whiteright, Texas, notify Browne Grain Company, which bills of lading showed shipment of said wheat in accordance with the terms of plaintiff's said contract of purchase from the Ed Past Grain Company, and of his said contract of sale to The Gladney Milling Company.

That relying upon the representations and recitations contained in said bills of lading issued by defendant, plaintiff paid said sight drafts drawn by the Ed Past Grain Company and came into possession of said bills of lading issued by defendant.

That said four bills of lading were signed by F. B. Choate, assistant general freight agent of defendant company, the scope of whose authority included the issuing of bills of lading for defendant for transportation in interstate commerce.

[fol. 9] The drafts to which said bills of lading were attached and paid by plaintiff were for the estimated amount due the Ed Past Grain Company for each of said cars of wheat, the freight charges on each car of wheat from point of origin to group I Texas being deducted from the price of such wheat at $2.36 per bushel basis group I, Texas and the drafts drawn for the difference, such freight charges to be paid at destination. Said drafts were based on the amount of wheat in each car as shown by such bills of lading and were as follows:

Car GN	#17527 81,000 pounds.....	draft for $2,650.00
Car CP	#72066 61,000 pounds.....	draft for 2,000.00
Car MC	#62632 81,000 pounds.....	draft for 2,650.00
Car WAB	#75411 81,000 pounds.....	draft for 2,650.00

304,000 # or 5066 2/3 bu.

Total drafts $9,950.00

That plaintiff would not have paid said drafts and taken up said order bills of lading had said order bills not shown that each of said cars were shipped by November 9, 1920.

5. That upon receipt of said order bills of lading, plaintiff immediately tendered said wheat to the Gladney Milling Company to apply on his said contract of sale to it, drawing sight drafts on said milling company for the estimated sale price of said four cars of wheat less freight charges, to which drafts were attached said order bills of

lading. That said Gladney Milling Company refused to pay said drafts, or to accept said four cars of wheat on its said contract of purchase from plaintiff, contending that said order bills were incorrectly dated and that said four cars of wheat were not shipped as represented in said order bills, or by November 9, 1920, and that they were not [fol. 10] applicable on said contract, said milling company being ready, willing and able to accept and pay for said four cars of wheat on said contract if shown that said four cars of wheat were in fact shipped as indicated by said order bills, or by November 9, 1920.

That plaintiff used every effort to ascertain whether the recitations in said order bills were correct and whether said four cars of wheat had been shipped as indicated by said order bills, or by November 9, 1920, but was unable to so ascertain; defendant and its different agents refusing to furnish plaintiff with the necessary and pertinent information.

Whereupon plaintiff being unable to apply said cars of wheat on said contract, sold same to the Gladney Milling Company at a price of $1.72½ per bushel, basis delivered Group I, Texas, or basis Sherman, Texas, which was the then reasonable market value of such wheat, a loss to plaintiff of 67½c. a bushel. That said sale to the Gladney Milling Company was made on the 18th day of March, 1918 over the telephone and was confirmed in writing by plaintiff, a copy of said letter of confirmation being hereto attached, marked Exhibit "C" and made a part hereof.

6. That in truth and in fact the recitations contained in said order bills and relied on by plaintiff were not true, said four cars of wheat not being shipped on the dates stated in said order bills by defendant.

Each of said order bills showed receipt of the numbered car by defendant from Ed Past Grain Company, consigned to order of Ed Past Grain Company, destination Whitewright, Texas, notify Browne Grain Company at Whitewright, Texas. Route, care M. K. & T. at Junction City, Kansas, and each was signed Ed Past Grain Co., ship- [fol. 11] per, per Otis, and by F. B. Choate, A. G. F. A., Agent, per R. G. A. The erroneous statements in said order bills were as follows:

Car GN #17527. Received "at Peavey, Idaho, 10/25/20." "Stop at Denver for Federal inspection. Issued at Denver, Colo. in lieu of B/L issued at Peavey, Idaho 10/25/20 Destn. unchanged." The fact was, and said order bill should have shown that it was issued at Denver, Colorado, November 22, 1920 in exchange for bill of lading issued at Ogden, Utah, November 19, 1920.

Car CP #72066. Received "at Buhl, Idaho, 11/5/20." "Stop Denver for Fed. Inspection. Issued at Denver, Colo., in lieu of B/L issued at Buhl, Idaho, Destination unchanged." The fact was, and said order bill should have shown that it was issued at Denver, Colorado, November 24, 1920, in exchange for bill of lading issued at Ogden, Utah, November 19, 1920.

Car MC #62632. Received "at Buhl, Idaho, 11/5/20." "Stop at Denver for Federal Inspection. Issued at Denver, Colo. in lieu

of B/L issued at Buhl, Idaho, Destn. unchanged." The fact was, and said order bill should have shown that it was issued at Denver, Colorado, November 24, 1920, in exchange for bill of lading issued at Ogden, Utah, November 19, 1920.

Car WAB #75411. Received "at Buhl, Idaho 11/2/20." "Stop at Denver for Federal Inspection. Issued at Denver, Colorado in lieu of B/L issued at Buhl, Idaho 11/2/20 Destination unchanged." The fact was, and said order bill should have shown that it was is-
[fol. 12] sued at Denver, Colorado, November 22, 1920, in exchange for bill of lading issued at Ogden, Utah, November 19, 1920.

That said original order bills were surrendered by plaintiff to the delivering carrier at destination and are now in defendant's, not plaintiff's possession, nor are any duplicate copies of said order bills, and plaintiff herewith demands that said original order bills be produced in court by defendant at the trial of this action, else the contents of said order bills will have to be established by secondary evidence.

7. That while plaintiff was endeavoring to apply said four cars of wheat on his contract of sale to the Gladney Milling Company and thereafter to sell said four cars of wheat, demurrage accrued on said four cars at Sherman, Texas, through no fault of plaintiff, totaling $607.00, which demurrage plaintiff found it necessary to and did pay. That plaintiff also paid the freight charges on said cars of wheat from point of origin to Sherman, Texas, or Group I, Texas, in the total amount of $1,651.16.

That the wheat contained in said four cars was No. 2 soft white wheat and was applicable on plaintiff's said contract of sale.

[fol. 13] That the amount of wheat in each of said cars, at destination, Sherman, Texas, being the amount delivered by the carrier upon the surrender at destination of said order bills; the amount of demurrage paid on each car by plaintiff; the freight paid on each car by plaintiff; the amount plaintiff would have received for each of said cars, if they had been shipped as stated in said order bills; the amount plaintiff actually received on his resale of said wheat; and the loss to plaintiff on each car, were as follows:

Car	Bushels	Demurrage	Freight	Contract	Sale	Loss
GN #17527	1,347	$143.00	$432.87	$3,232.80	$2,323.57	$1,052.23
CP #72066	1,011–1/3	149.00	325.00	2,427.20	1,744.55	830.65
MC #62632	1,344–1/3	158.00	460.63	3,226.40	2,318.98	1,065.42
WAB #75411	1,346–1/3	158.00	432.66	3,231.20	2,322.42	1,066.78
	5,049	$607.00	$1,651.16	$12,117.60	$8,709.25	$4,015.08

[fol. 14] 8. That plaintiff actually paid out for said wheat, including drafts, $9,950.00, freight, $1,651.16, and demurrage, $607.00, the total sum of $1,208.16. That if said order bills had been corrected and if said cars had been shipped as therein indicated, he would have received for said wheat from the Gladney Milling Company the gross sum of $2.40 a bushel, basis delivered Group I, Texas, or $12.117.60, out of which would have been deducted the freight charges of $1,651.16, or a net sum of $10,466.44. That by reason of the fact that said four cars of wheat were not shipped as indicated in said order bills, or by November 9, 1920, plaintiff found it necessary to and did sell said wheat on the open market for the then reasonable market value of $8,709.52 basis delivered Group I, Texas, and had to pay the freight charges of $1,651.16, and demurrage of $607.00 accrued through no fault of his, receiving a net sum therefor of $6,451.36, or $4,015.08 less than he should have received therefor, to his damage in said amount, which damage was suffered January 1, 1921.

9. That after plaintiff paid said drafts drawn on him by the Ed Past Grain Company, and took up the order bills thereto attached, all in reliance on the recitations therein contained, and before plaintiff learned the true facts concerning the recitations in said order bills contained and concerning the dates of shipment of said cars, said Ed Past, conducting said Ed Past Grain Company, became insolvent and a fugitive from justice, which situation still exists. That immediately upon learning the facts concerning said order bills, and within thirty days thereafter, plaintiff made written demand upon defendant for the payment of the damages suffered by him as aforesaid, which demand was refused.

[fol. 15] 10. That said damage to plaintiff was caused by the fault of defendant in issuing said incorrect order bills of lading which were negotiated to plaintiff for value and which were relied on by plaintiff, he having no knowledge that the recitations therein contained were not true, when he became the lawful holder thereof.

Wherefore, plaintiff prays for judgment against defendant in the sum of $4,015.08, plus 6% interest on said sum from January 1, 1921 to date of judgment herein, and for the costs of this action.

EXHIBIT "A" TO PETITION

Written confirmation of sale dated October 18, 1920 and signed by the Ed Past Grain Company at Denver, Colorado confirming sale to the Browne Grain Company of McKinney, Texas of 10,000 bushels No. 2 soft white wheat, old government scale discounts for lower grades at a price of $2.36 per bushel basis delivered Group I Texas, destination weights official grades "Time of Shipment—fifteen days."

EXHIBIT "B" TO PETITION

Confirmation of purchase signed by the Gladney Milling Company at Sherman, Texas dated October 30, 1920 confirming purchase from The Browne Grain Company of McKinney, Texas of 5,000 bushels No. 2 white wheat at $2.40 per bushel delivered Texas Group 1, Sherman Official Grades and Weights "shipments within ten days" to be billed to Sherman.

Exhibit "C" letter dated March 18, 1921, Browne Grain Company to Gladney Milling Company at Sherman, Texas, as follows:

[fol. 16] EXHIBIT "C" TO PETITION

Referring to our 'phone conversation, we are making draft on you, warehouse receipts and other necessary papers attached for the white wheat, $1.72½ delivered Group #1, we to pay no storage and no unloading charge.

It is also understood that in case it is shown up by Mr. Past that this wheat was not unloaded or transited enroute and that it moved in contract time that you will allow us the invoice price, $2.40 per bushel, as per your letter of January 8th.

Thank you.

To the plaintiff's petition as amended, defendant filed the following:

IN DISTRICT COURT OF SHAWNEE

ANSWER

1. Now comes Union Pacific Railroad Company defendant above named and for its answer to the petition and amendment thereto filed by the plaintiff herein, denies each and every, all and singular, the allegations therein contained, except such as are hereinafter specifically admitted.

2. Defendant admits that plaintiff purchased wheat from The Ed Past Grain Company on the basis of the contract set out as Exhibit A to the amendment to plaintiff's petition and that plaintiff extended the time of said contract to date of November 9, 1920; but defendant alleges that under the terms of said contract, the plaintiff having failed to specifically notify The Ed Past Grain Company that the said contract was cancelled, was bound by the terms thereof to accept said shipments of wheat when they arrived at McKinney, Texas, regardless of the dates of the bills of lading or the dates said [fol. 17] shipments of grain were consigned from their point of origin.

3. Defendant further answering, admits that the plaintiff contracted to sell the wheat in question to The Gladney Milling Company of Sherman, Texas, under the terms of the contract, as shown by Exhibit "B" attached to plaintiff's amendment to this petition, but this answering defendant alleges that no notice was at any time given to the defendant herein by anyone, of the purposes for which said shipments were being made nor was it ever advised of the terms of any contracts to be fulfilled upon the arrival of said shipments at destination, which contracts are now claimed by the plaintiff to have been in existence at the time, as shown by these Exhibits A and B. Defendant alleges further that it had no knowledge of any kind, and did not by any custom or usage know, that the shipments were to be applied in fulfillment of the terms of any such contracts or that reliance was being placed upon the dates of the bills of lading as determining the rights of the consignors of said shipments, the party specified in said bills of lading to be notified, and some unknown third party thereunder.

4. Further answering, defendant admits that plaintiff acquired possession of the order bills of lading covering the shipments in question, which were signed by an agent of the defendant company at Denver, Colorado; but defendant alleges that said bills of lading were prepared by the Ed Past Grain Company, consignor of said shipments and plaintiff's assignor; that all of the blanks in the forms of the bills of lading, which are customarily furnished by carrier companies to shippers, were filled out by the said Ed Past Grain [fol. 18] Company and the same were presented to the defendant's agent for his signature in the rush of business. That the defendant's agents, relying upon the good faith of the plaintiff's assignor in preparing said bills of lading, signed the same and his signature was in this manner directly and solely procured by the fraud of the Ed Past Grain Company. Defendant further alleges that if there were any false statements in said bills of lading contained, they were placed therein and made by the fraud of the plaintiff's said assignor, and that it was without the scope of the authority of defendant's agent to sign bills of lading containing any false or erroneous statements. Defendant further alleges that said bills of lading describe the shipments in question accurately and stated the weight thereof correctly, and that said shipments were carried through to destination promptly and were fully and safely delivered to the plaintiff herein or to his order upon surrender to the destination carrier of said bills of lading.

5. Defendant denies specifically that plaintiff used every effort to ascertain the dates said shipments were made, and this defendant alleges that the freight bills which plaintiff alleges were paid by him, show fully the points where different parts of said shipments originated in less than carload lots, and show the transit point where the same were consolidated into the four carload shipments involved in this action; that had plaintiff awaited the arrival of said shipments at McKinney, Texas, before paying the drafts attached to the bills of lading he could, by inquiring of the delivering carrier, having

ascertain all of the facts relative to the dates and points of origin of said shipments, and defendant alleges this information was equally [fol. 19] available to him at any time hereafter. Defendant further alleges that by reason of the lateness of the delivery of said shipments, plaintiff was, or should have been warned, of the probability of the fraud of the Ed Past Grain Company, and should have detected the same prior to the payment of the drafts and acceptance of the wheat, as did The Gladney Milling Company when the wheat was thereafter tendered to them for application on the contract between them and the plaintiff.

6. Defendant further alleges that said shipments of wheat arrived at Sherman, Texas, on December 2, 3rd, 6th and 7th, 1920, respectively. That as alleged in plaintiff's petition, The Gladney Milling Company immediately refused to accept the same upon its contract of purchase; that the plaintiff knowing this, permitted said wheat to remain in the cars at Sherman, Texas, until January 14th, 1921, when three of the cars were unloaded, and January 17th, 1921, when the fourth car was unloaded, thereby incurring demurrage charges totaling $607.00; that at the time stated, said shipments were unloaded by The Gladney Milling Company and the same were stored in their elevator for the account of the plaintiff, where the same remained until March 19, 1921, when the plaintiff sold the wheat to The Gladney Milling Company on the basis of the then market price, which was down and rapidly dropping lower. Defendant further alleges that during the time said wheat remained in the cars at Sherman, Texas, the market value of No. 2 soft white wheat remained up, and that on several occasions the wheat in question could have been sold on the market by the plaintiff at a price equal to, and often in excess of the contract price agreed upon between the plaintiff and The Gladney Milling Company, but that regardless of [fol. 20] this, said wheat was not sold until March 19, 1921. Defendant further alleges that any loss sustained by the plaintiff growing out of the shipments of wheat in question was not proximately occasioned by any failure of the defendant company, and that any such loss was directly and proximately caused, by the fraud of the Ed Past Grain Company and by the failure of the plaintiff to use proper and reasonable care in the premises, in that he failed to notify the Ed Past Grain Company of the cancellation of their contract; received said wheat at a late date without making any effort to ascertain if the shipments were made within the contract limitations, and that he failed to use any degree of diligence in keeping the damages down to a minimum after the wheat in question had been refused by the Gladney Milling Company.

To this answer plaintiff filed the following:

IN DISTRICT COURT OF SHAWNEE COUNTY

MOTION TO STRIKE

Comes now the plaintiff herein and moves the court to strike from the answer of defendant filed herein as surplusage, redundant and immaterial the following parts thereof:

1. All that part of paragraph 3 of said answer commencing with the words, "but this answering defendant," in the fourth thereof and extending to the end of said paragraph.

2. All of paragraph IV of said answer.

3. All of paragraph V of said answer.

---

and also filed the following

DEMURRER TO ANSWER

Comes now the plaintiff and demurs to the answer of defendant [fol.21] filed herein for the reason that same fails to state facts sufficient to constitute a defense to plaintiff's cause of action as set out in his petition.

Plaintiff demurs specially to the third paragraph of the answer of defendant filed herein for the reason that same fails to state any facts constituting a defense to plaintiff's cause of action as set out in his petition.

Plaintiff demurs specially to the fourth paragraph of defendant's answer filed herein for the reason that same fails to state facts sufficient to constitute any defense to plaintiff's cause of action as set out in his petition.

Plaintiff demurs specially to the fifth paragraph of defendant's answer filed herein for the reason that same fails to state facts sufficient to constitute any defense to plaintiff's cause of action as set out in his petition.

Plaintiff's motion and demurrer were overruled as shown by the following:

IN DISTRICT COURT OF SHAWNEE COUNTY

JOURNAL ENTRY OF JUDGMENT—Omitted; printed side page 3

[fol. 22] Thereafter plaintiff filed the following:

IN DISTRICT COURT OF SHAWNEE COUNTY

NOTICE OF APPEAL—Omitted; printed side page 2

CERTIFICATE

We certify that the foregoing is a true and correct abstract of the pleadings and proceedings herein.

Campbell & Campbell, Wichita, Kansas, Attorneys for Appellant.

[fols. 23–25 IN DISTRICT COURT OF SHAWNEE COUNTY

SPECIFICATIONS OF ERROR

The trial court erred:

In overruling plaintiff's motion to strike portions of defendant's answer.

In overruling plaintiff's demurrer to defendant's answer, and portions thereof.

In rendering judgment in favor of defendant and against the plaintiff.

[fol. 26] IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 24605

[Title omitted]

Counter Abstract—Filed May 8, 1923

As a counter abstract, appellee submits plaintiff's Exhibits "A" and "B," in full, to supplement the showing made on page 10 of appellant's abstract:

EXHIBIT "A" TO PETITION

No. 1282

Ed Past Grain Company

Denver, Colo., October 18, 1920.

The Browne Grain Company, McKinney, Texas:

We confirm sale to you today thru Kansas City Brokerage Co. Quantity-Care-10,000 bushels-Grain No. 2 soft white wheat-Old gov-

[fol. 27] ernment scale discounts lower grades, Price $2.36 per bushel. Basis del. group One Texas. Time of shipment-fifteen days. Billing-Rush billing instructions. Destination weights, official grades.

Payment by demand draft with documents attached upon presentation.

It shall be the duty of the buyer to furnish shipping directions immediately or upon request of the seller, and if the buyer fails to furnish directions, in accordance with this agreement, the seller reserves the right, without further notice to the buyer, to cancel the contract charging loss, if any, to the buyer, or to sell same for the buyer's account. Grain not shipped within specified time, contract will be considered open until shipped, unless we have been advised the same has been cancelled.

Shipping terms are defined as follows:

Immediate shipment shall mean within three calendar days at place of shipment.

Prompt shipment shall mean within ten calendar days at place of shipment.

Five days' shipment shall mean within five calendar days at place of shipment, etc.

Excluding the date of sale, time of shipment shall be figured from date full shipping directions are received at Denver.

If any feature of this contract is not in accordance with your understanding, or is not agreed to, wire us immediately on receipt of this confirmation.

Manifest errors excepted.

Ed Past Grain Company, Per —— Past.

[fol. 28] EXHIBIT B TO PETITION

No. 1047

Gladney Milling Company

Sherman, Texas, October 30, 1920.

Browne Grain Co., McKinney, Texas:

We confirm purchase from you by Mr. Gladney today of 5,000 bu. No. 2 white wheat at $2.40 per bushel delivered Texas group one Sherman official grades and weights shipments within ten days. Lower grades to be applied at the following discounts: No. 3 to apply at 3c. discount. Nothing under No. 3 to apply. Bill as follows: Sherman:

It is also understood and agreed that this confirmation is a part of the contract and that if the grain mentioned above is not shipped within the specified time, we reserve the right, at our option, to

cancel, extend time or buy in for seller's account, and that this contract is not performed until weights and grades mentioned above are obtained.

No grade to be accepted if we consider it unmerchantable.

We reserve the right to change the destination of grain in transit.

Draw on us (Without exchange) through the Merchants & Planters National Bank at Sherman, Texas, with Bills of Lading attached to draft leave margin to protect weights and grades.

"Shippers' Order" Bills of Lading must be endorsed.

Gladney Milling Company, By J. L. James."

[fols. 29 & 30] The above and foregoing is a true and correct counter abstract of the Exhibits in the above entitled case.

T. M. Lillard, Bruce Hurd, O. B. Eidson, Attorneys for Appellee.

[fols. 31 & 32] IN THE SUPREME COURT OF THE STATE OF KANSAS

Topeka, Tuesday, May 8th, 1923.

[Title omitted]

ARGUMENT AND SUBMISSION—Filed May 8, 1923

This cause comes on to be heard on the appeal papers and abstracts of the record from the district court of Shawnee County, Div. No. 2; and thereupon after oral argument by Ray Campbell for the appellant and by O. B. Eidson for the appellee said cause is submitted on briefs of counsel for both parties, and taken under advisement by the court. It is further ordered that the appellant be given until Monday the 14th day of May in which to file reply brief herein.

[fols. 33 & 34] IN THE SUPREME COURT OF THE STATE OF KANSAS

[Title omitted]

JUDGMENT—Filed June 9, 1923

This cause comes on for decision and thereupon it is ordered and adjudged that the judgment of the court below be affirmed. It is further ordered that the appellant pay the costs of this case in this court taxed at $— and hereof let execution issue.

Dawson, J., delivered the opinion of the court, Burch, J., Mason, J., & Marshall, J., concurring, Harvey J. Hopkins, J., and Johnston, C. J., dissenting.

[fol. 35] IN SUPREME COURT OF KANSAS

[Title omitted]

Appeal from Shawnee County, Second Division

Affirmed

OPINION—Filed Sat., June 9, 1923

Syllabus by the Court

Dawson, J.

1. The dating of an interstate shipper's order bill of lading is not part of the description of the goods mentioned therein, and the federal act of June 5, 1916, (Ch. 415, 39 Stat. L. 538) has not changed the rule announced in Atchison & Topeka Ry. v. Harold, 241 U. S. 371, 60 L. ed. 1050, touching an innocent holder's right of action against the issuing carrier for misdating such order bill.

2. Other matters pleaded in defense considered, and held not subject to demurrer.

Burch, J., Mason, J., Marshall, J., concurring.
Harvey, J., Hopkins, J., and Johnston, C. J., dissenting.

A true copy. Attest: —— ——, Clerk Supreme Court.

[fol. 36] The opinion of the court was delivered by

DAWSON, J.:

The plaintiff brought this action for damages sustained through his reliance on erroneous datings on four shipper's order bills of lading issued by defendant.

The plaintiff, a grain dealer of McKinney, Texas, alleged that on October 18, 1920, he bought 10,000 bushels of wheat from the Ed Past Grain Company of Denver, Colorado, at $2.36 per bushel, to be shipped on or before November 2, 1920, but the time was extended until November 9, 1920. Plaintiff gave the grain company instructions to ship the wheat to Whitewater, Texas, via defendant's railway and another. Separate shipper's order bills of lading for each of four cars of this wheat was issued at Denver by the defendant railroad company. On October 30, 1920, plaintiff sold 5,000 bushels of this wheat to The Gladney Milling Company of Sherman, Texas, shipment to be made by November 9, 1920, and billed to Sherman. The Ed Past Grain Company presented to plaintiff four sight drafts with the four shipper's order bills of lading attached each of which recited receipt of a carload of wheat by defendant. Plaintiff paid these drafts and received the bills of lading. He alleged that he relied on the recitals in the bills of lading, which had been signed by

defendant's agent, and that he would not have paid the drafts and would not have taken up the bills of lading had they not shown that the cars were shipped by November 9, 1920. Plaintiff then tendered the four bills of lading to the Gladney Milling Company pursuant to his sale of 5,000 bushels of wheat to that company, but the latter refused to accept them and refused to accept the four cars of wheat, on the ground that the bills of lading were incorrectly dated and that the wheat had not been shipped as represented thereon, or by November 9, 1920, and were therefore inapplicable on plaintiff's contract of sale with the Gladney Milling Company. Consequently plaintiff had to sell the wheat at a loss, by which he sustained damages. The alleged inaccuracies in the bills of lading were—

[fol. 37] On B/L for Car G. N. #17527, it was recited:

"Received at Peavey, Idaho, 10/25/20. Stop at Denver for Federal inspection. Issued at Denver, Colo. in lieu of B/L issued at Peavey, Idaho 10/25/20 Destn. unchanged."

Plaintiff alleged that this order bill should have shown that it was issued at Denver, Colorado, November 22, 1920 in exchange for bill of lading issued at Ogden, Utah, November 19, 1920.

On B/L for C. P. #72066, it was recited:

"Received at Buhl, Idaho, 11/5/20. Stop Denver for Fed. Inspection. Issued at Denver, Colo. in lieu of B/L issued at Buhl, Idaho. Destination unchanged."

Plaintiff alleged that this order bill should have shown that it was issued at Denver, Colorado, November 24, 1920, in exchange for bill of lading issued at Ogden, Utah, November 19, 1920.

On B/L for M. C. #62632, it was recited:

"Received at Buhl, Idaho, 11/5/20. Stop at Denver for Federal Inspection. Issued at Denver, Colo. in lieu of B/L issued at Buhl, Idaho, Destn. unchanged."

Plaintiff alleged that this order should have shown that it was issued at Denver, Colorado, November 24, 1920, in exchange for bill of lading issued at Ogden, Utah, November 19, 1920.

On B/L for W. A. B. #75411, it was recited:

"Received at Buhl, Idaho, 11/2/20. Sto- at Denver for Federal Inspection. Issued at Denver, Colorado in lieu of B/L issued at Buhl, Idaho, 11/2/20. Destination unchanged."

Plaintiff alleged that his order bills should have shown that it was issued at Denver, Colorado, November 22, 1920, in exchange for bill of lading issued at Ogden, Utah, November 19, 1920.

Plaintiff also alleged that before he learned that the datings on the bills of lading were incorrect and that the shipments had not been made at the times therein recited, Ed Past, trading as the Ed Past [fol. 38] Grain Company, became insolvent and was and is a fugitive from justice, and—

"That said damage to plaintiff was caused by the fault of defendant in issuing said incorrect order bills of lading which were negotiated to plaintiff for value and which were relied on by plaintiff, he having no knowledge that the recitations therein contained were not true, when he became the lawful holder thereof."

The defendant answered, admitting plaintiff's contracts of purchase and sale, but alleging, in substance,—

Second. That under the terms of his contract with plaintiff the Past Company was bound to accept the shipments regardless of dating of bills of lading.

Third. That defendant, at that time its Denver agent signed the bills of lading, had no knowledge of any contract between plaintiff and the Past Company, or between plaintiff and the Gladney Milling Company either specific or by reason of custom or usage, and that it did not and could not know that any special reliance would be placed by anyone on the dating of the bills of lading.

Fourth. That if the Denver bills of lading were misdated this was done by the Past Grain Company who prepared the forms, presenting them to the carrier for signature only; that it was without the scope of authority of defendant's agent to bind the company by signing bills of lading containing any false statements; that such bills described the shipments accurately, stated the weight thereof correctly, and that the shipments were carried through to destination promptly and were fully delivered to the order of plaintiff at destination.

Fifth. That had plaintiff awaited the arrival of the shipments at destination before taking up the drafts he would have been fully informed of the original points of origin of the shipments in Idaho and the dating of the Oregon, Utah, bills by notations on the statements for freight charges which would have been presented to him for payment in usual course. That in any event the plaintiff should have been warned of the probability of misdating of the Denver bills by reason of the late arrival of the bills of lading and shipments.

[fol. 39] Plaintiff moved to strike out the most of the matters in defendant's answer summarized above. The motion was overruled. Plaintiff then filed a general demurrer and a special demurrer to the third, fourth and fifth paragraphs of the answer. These demurrers were overruled and plaintiff appeals, contending that these shipper's order bills of lading having to do with interstate commerce are strictly negotiable.

Since the decision of the United States Supreme Court, June 5, 1916, in Atchison & Topeka Ry. v. Harold, 241 U. S. 371, 61 L. ed. 1050, reversing our own decision, Harold v. Railway Co., 93 Kan. 456, 144 Pac. 823, it is too clear for comment that these interstate bills of lading under consideration are exclusively governed by federal law, and the Kansas law touching responsibilities arising from

their issue is inapplicable. At the time the Harold case was decided, interstate shipper's order bills of lading were not negotiable instruments. Following that decision the Congress on August 29, 1916, enacted chapter 415, 39 Statutes at Large, 538, (Fed. Stat. Ann.—1918, Supp. 72 U. S. Comp. Stat. 1916, §8604 aaa et seq.) This act relates to bills of lading in interstate and foreign commerce. Plaintiff contends that the text and effect of this act is to make shipper's order bills of lading unqualified negotiable instruments. The act does not specifically so declare, although it does clothe them with certain attributes of negotiable instruments—"within the meaning of this act." (§3.) No specific language in the act can be construed to impose liability on the carrier for an erroneous dating of an order bill of lading. Plaintiff argues that such liability is imposed by section 22 which provides that where a carrier has issued an order bill it shall be liable thereon to the holder thereof who has given value therefor in good faith "relying upon the description of the goods, for damages caused by * * * their failure to correspond with the description thereof in the bill at the time of its issue." It would be an undue extension of the statutory words "description of the goods" to say that the date of shipment of the goods as shown by the bill of lading is part of the description. A description of a car-load of goods is a statement or recital of their character, of their sort, kind or species. Thus, a carload of shelled corn, ear corn, yellow corn, or white corn. If the corn was in the [fol. 40] ear and the bill of lading said it was shelled, or if the bill said it was white when in fact it was yellow, or if it was in fact a carload of oats or barley, there would be a misdescription for which the carrier would be liable in damages to a person who had paid for the corn in reliance on the description in the bill of lading. But since Congress specifically defined the matters as to which the carrier issuing an order bill of lading would be liable, the liability goes no further. Expressio unius est alterius exclusio.

A careful reading of the federal state discloses no language which by fair intendment can be said to impose a liability on the carrier in favor of an innocent transferee of an order bill, for inaccurate or incomplete dating thereof; so the rule announced by the federal supreme court in the Harold case touching a holder's right of action against a carrier for the misdating of an order bill of lading necessarily is still the law. It follows that insofar as plaintiff's demurrer involved the question chiefly urged here, the ruling of the trial court was correct.

The other matters pleaded in defendant's answer, to which the plaintiff objected and demurred, need but brief attention. The fact, if correct, that plaintiff was bound to accept the shipments from the Ed Past Grain Company, may not be a complete defense to plaintiff's cause of action, but it does raise an issue which may become important on the measure of damages if any are recoverable in the action. And whether there was a custom of grain dealers to rely on the datings of bills of lading, of which the carrier had notice or was bound to take notice, was also a question of fact, and therefore not demurrable. The scope of the powers of defendant's agent at Den-

ver could not be determined by demurrer; and neither could the matters pleaded in the fifth paragraph of the answer summarized above.

The judgment is affirmed.

Burch, J., Mason, J., Marshall, J., concurring.

IN SUPREME COURT OF KANSAS

DISSENTING OPINION

HARVEY, J. (dissenting): The principal object in the passage of the Federal Bill of Lading Act, Chapter 415, 39 Statute at large, 538, was to make order bills of lading strictly negotiable. At the time of the passage of this act it was estimated that more than $5,000,000,000.00 in order bills of lading were handled annually by [fols. 41 & 42] banks and commercial houses and much loss had been sustained by reason of them not being strictly negotiable and various defenses arising in connection with their risk. (Report No. 847, 64th Congress, 1st session, House of Representatives; Report No. 149, 64th Congress, 1st session, Senate.) The date and place of origin of a shipment may be a part of the description of the merchandise and is, in fact, sometimes a vital part of it. In fact, no other good reason suggests itself for placing the date and place of origin on the bill of lading except to form part of the description of the merchandise.

Hopkins, J., joins in this dissent.
Johnston, C. J., dissents.

[fol. 43] IN THE SUPREME COURT OF KANSAS

[Title omitted]

PETITION FOR REHEARING—Filed June 27, 1923

Appellant petitions this Court for rehearing herein and represents:

That on June 9, 1923 this Court affirmed the decision of the District Court of Shawnee County, Kansas, which overruled Plaintiff's Demurrer to that part of Defendant's Answer which attempt to explain the circumstances under which misdated bills of lading were issued by it.

In its opinion this Court holds that except as otherwise provided by the Federal Bill of Lading Act of 1916, The Federal Rule is that shipper's order bills of lading are not strictly negotiable and that a carrier is not liable to a purchaser for value of such an order bill

for damages resulting from the misdating thereof. We admit this premise under the authority of A. T. & S. F. Rly. Co. v. Harold 241 U. S. 371.

This Court further holds that the Pomerene Act does clothe order bills with certain attributes of negotiable instruments, within the meaning of said Act but does not specifically impose liability on a carrier for erroneous dating of an order bill, and that as the act "specifically defined the matters as to which the carrier issuing an order bill of lading would be liable, the liability goes no further, Expressio Unius Est Alerius Exclusio."

And then this Court further holds that the only liability of the carrier under the Pomerene Act is that imposed by Section 22 thereof which provides that it shall be liable to an innocent purchaser of an order bill "relying upon the description therein of the goods for damages caused by * * * their failure to correspond with the description thereof in the bill at the time of its issue."

Holding that the only liability of the carrier herein is that imposed by the above quoted part of Section 22, this Court further holds that "It would be an undue extension of the statutory words, [fol. 44] 'description of the goods' to say that the date of shipment of the goods as shown by the bill of lading is part of the description. A description of a car load of goods is a statement or recital of their character, of their sort, kind or species."

We admit that in its opinion herein this court squarely decided the issues raised but we contend that it misconstrued the meaning of the statutory words "description of the goods" and we ask a rehearing that this phase of the question have further consideration.

The majority decision of this Court was dissented from by the Chief Justice, the senior member of this Court and by Justices Harvey and Hopkins, the two junior members.

Three or four justices of this court were wrong. Which?

It seems very strange that Congress should pass a Federal Bill of Lading Act of forty-five sections, unquestionably intended for the protection of the innocent purchasers of order bills of lading, the net result of which Act is to make carriers liable to such purchasers only for non-receipt of all or part of the goods described in the bill and for a mis-statement of the sort, kind of species of goods described in such order bill. Did any member of this Court ever hear of an instance of a carrier issuing an order bill for a car of oats when it was in fact a car of wheat; or for a car of horses when it was in fact a car of hogs? We never did. And as to describing a car of white corn as yellow corn; or a car of soft wheat as hard wheat; this court must know that no carrier includes such details in its bills of lading. Presumably the recommenations of the American Bar Association, the various committee hearings had in Congress and the arguments therein relative to the necessity of the Federal Bill of Lading Act were premised on some actual condition which needed remedying. Unquestionably one of such conditions was the issuance by carriers of order bills acknowledging receipt of a certain amount of grain or other commodities when in fact a lesser amount or none at all was received. Why should Congress concern itself to

make carriers liable for issuing an order bill for a car load of giraffes when in fact it received a car load of elephants. Why delve into the realm of conjecture to find improbably instances where a carrier might be liable for a misdescription in an order bill when there are multitudinous instances in our commercial activities of [fol. 45] misdescriptions in order bills which might and do result in damages to the innocent purchasers thereof.

As suggested by Justice Harvey in his dissenting opinion, why place the date and place of origin of shipment in an order bill except to form a part of the description of the merchandise?

This Court by its opinion delimits a description of goods to a recital of their physical characteristics such as white or yellow, shelled or on the ear. Under this rule the description of a girl would be limited to her physical characteristics, such as blonde or brunette, tall or short, and the date and place of her origin or birth which might indicate her age or nationality, or her disposition or temperament would comprise no part of her description. And every one know- that the mere recital of physical characteristics of a girl constitutes the smallest part — her correct description.

We know of no previous judicial determination of what constitutes the description of goods in an order bill. The construction of Section 22 of the Pomerene Bill must then be based on the intent of Congress in enacting the Bill, and upon the usual and customary meaning of common English words. And we challenge Appellee to find a single case of claimed liability of a carrier resulting from an incorrect statement or recital of the character, sort, kind or species of goods covered by an order bill. So why should it be presumed that the quoted part of Section 22 was intended by Congress to apply to an unknown contingency? But a damage resulting from the misdating of an order bill was not an unknown or unthought of contingency, for the Federal Supreme Court, but a few months earlier, had been called upon to consider liability of a carrier under exactly such a state of facts.

Is it not reasonable to presume that Congress, in making a carrier liable for a misdescription of goods in an order bill, had in contemplation such a misdescription as might occur, to the damage of the purchaser of such order bill, there being reported cases involving such misdescription, and not some misdescription that never had occurred and probably never would occur?

Giving Congress the benefit of the doubt, it presumably, before passing the Pomerene Act, considered all phases of loss or damage [fol. 46] *that* and unheard of possibility of damage resulting from describing a gondola of coal as a car load of pianos?

Furthermore, the goods described are the goods comprising a shipment, not goods exhibited at a county fair. So Congress, in legislating relative to the description of goods in an order bill, must have had in contemplation such description as might have been pertinent in consideration of the relationship between carrier and consignee. And taking into consideration that Section 22 refers to shipments of goods, and that the only pertinent description of such goods in an order bill would describe them in relation to their ship-

ment, surely the description of the date and place of shipment comprises a part of the description of the goods shipped.

Or suppose that a bank was asked to loan money on an order bill covering shipment of perishable goods, such as fruit, vegetables or eggs. It would hardly do so unless the order bill showed shipment very recently. No banker would take up an order bill for a car of eggs if same showed shipment several months previously. To act intelligently he would have to rely on the date appearing in the order bill. And certainly the date of shipment of a car of eggs would be highly descriptive of the eggs themselves.

A Wichita grain dealer recently tried to discount his draft, with an order bill of a car of wheat attached, at a local bank. The banker of course inspected the recitations on the lading before advancing money thereon, and learned therefrom that the car had been shipped from a nearby town to Wichita some three months before. This of course meant that the car had been in Wichita nearly three months and that about $500.00 demurrage had accrued thereon with the result that the car of wheat was then worth $500.00 less than the ordinary market value. This instance surely indicates that the date on an order bill is very material in commercial transactions, and is relied upon by purchasers and bankers. And to the extent that the date indicated the value of the wheat, by showing accrued demurrage, it was absolutely descriptive thereof.

Another thought. Not one time in forty does an agent signing a bill of lading have personal knowledge of the weight or color of grain covered thereby. The prepared order bill is taken to his office by the shipper and signed by the agent in reliance on the shipper's honesty. But the date of signing such an order bill is necessarily known to the agent, presuming that he knows how to read a calender. [fol. 47] Or in the instant might occur to those who bought and paid for order bills in the usual course of commerce and sought thereby to facilitate and expedite trade and commerce by making order bills negotiable and by making carriers liable in certain known contingencies. Undoubtedly the over-billing of car lot shipments in order bills, to the damage of innocent purchasers thereof, was one of the most usual contingencies that arose in commercial transactions, as evidenced by the amount of reported litigation arising therefrom, so Congress specifically made carriers liable for the non-receipt of the goods described in an order bill, regardless of whether the agent executing such order bill had authority so to do, if he was acting within the scope of his apparent authority. But if this was the only contingency contemplated by Congress in enacting Section 22, as insisted by Appellee in its brief and argument before this Court, why was that part of Section 22 included which makes carriers liable when the goods covered by an order bill fails to correspond with the description thereof in such bill?

Is it not reasonable to assume that Congress, by making carriers liable for a misdescription, intended thereby to cover all incorrect statements in an order bill, other than over-billing, which might result in damages to an innocent purchaser thereof?

We at this time have pending a claim against a carrier which issued an order bill reciting "freight prepaid," which order bill our client paid for in reliance on such recitation. The freight was not prepaid, and had to be paid at destination to our client's damage in the amount thereof. By this court's interpretation of Section 22, as such mis-statement was not as to the color, weight or consistency of the goods shipped, or their character, sort, kind of species, the carrier would not be liable, and it would be a good defense for the carrier to plead that its agent had no authority to execute such an order bill. In purchasing such order bill our client relied on the various recitations thereof, the date, weight, and statement that freight was prepaid, as well as upon the recital that the car contained wheat, considering that all such recitals were a part of the description of the goods shipped.

Is it not reasonable to presume that Congress had in contemplation such a known and rather frequent damage resulting from an untrue statement in an order bill, in referring to misdescriptions, [fol. 48] rather than the unknown case the original ladings were surrendered by Ed Past to Appellee's agent at Denver who signed the exchange ladings in question, the statements therein as to dates being taken from such original ladings. The agent did not have to rely on anyone, in showing the dates of original shipments in the exchange ladings, but merely had to read such dates from the original ladings then before him.

Is it reasonable to assume that Congress intended by the Pomerene Act to make a carrier liable for mis-statements in an order bill as to weight, texture or shape of goods shipped, of which its agent had no personal knowledge, and not to make it liable for mis-statements of facts absolutely within the agent's knowledge, which statements would be relied upon by a purchaser?

In Leigh Ellis v. Davis, 67 L. Ed. Adv. Sheet of Feb. 15, 1923, the United States Supreme Court affirms the Fifth Circuit Court of Appeals, (276 Fed. 400) which affirmed the U. S. District Court of Georgia (274 Fed. 443) in dismissing a petition of a purchaser of an order bill who claimed damages because of reliance on the bill of lading weight. While it was held that the goods shipped (bales of cotton) were package freight and that the bill of lading weight was mere surplusage, as the number of bales was correctly given, under Section 20 of the Pomerene Act, the Federal Supreme Court also holds that the action was barred because not brought within two years and a day, in compliance with the Bill of lading provision that:

"Suits for loss, damage, or delay shall be instituted only within two years and one day after delivery of the property."

It was contended that this provision applied only to loss or damage to the property shipped and did not cover the statutory liability arising from misrecitals in the order bill. But the Supreme Court held that the claim of statutory liability "is of the kind that the clause, 'suits for loss, damage, or delay' manifestly intended to limit, and

we see no reason why it should not be included under the head of loss."

One might reasonably assume that in fixing the limitation at a certain time from the delivery of the property, the loss referred to would be of the property itself. Yet the Supreme Court says that such loss also includes the statutory liability for over-billing. We [fols. 49 & 50] cite this decision as indicative of the Supreme Court attitude as to a strict interpretation of English words. And surely the date of shipment of goods is such a part of the description thereof as was manifestly intended to be included in the statutory liability of a carrier imposed by Section 22 of the Pomerene Act.

We think that the majority of this Court in its opinion placed entirely too limited and too literal a construction on the phrase "relying upon the description therein of the goods" when it held that such description was intended only to refer to their sort, kind or species. As said by Justice Reynolds of the concept "property"—

"The accurate delimitation of the concept 'description' would afford a theme especially opposite for amplificative philosophic disquisition."

When this Court, with undue scrupolonsoty, limited the description of goods to a recital of their character or kind, it becomes evident that, we, in our original presentation of this case, had not sufficiently attracted consideration to all phases of the question to the evident intent and purpose of Congress and to the evils sought to be remedied by Section 22 of the Pomerene Act.

And to the end that this matter may be more thoroughly presented and that this Court may give to the interpretation of the words of *the words of* Section 22 the consideration they merit, Appellant earnestly petitions for a rehearing herein.

Respectfully Submitted, Campbell & Campbell, Attorneys for Appellant.

[Endorsed:] 8, 41. 24605. Browne v. U. P. R. R. Davison, J. Petition for rehearing.

[fol. 51] IN THE SUPREME COURT OF THE STATE OF KANSAS

[Title omitted]

ORDER OVERRULING PETITION FOR REHEARING—Filed July 10, 1923

Now comes on for decision the petition for a rehearing of this cause, and thereupon it is ordered that said petition for a rehearing be overruled.

[fol. 52] IN THE SUPREME COURT OF THE STATE OF KANSAS

[Title omitted]

CLERK'S CERTIFICATE

I, D. A. Valentine, Clerk of the Supreme Court of the State of Kansas, do hereby certify that the above and foregoing is a full, true and complete transcript of the record and proceedings had in the above entitled case, and also of the opinion of the court rendered thereon, as the same appear on file and remain of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in the city of Topeka, this 4th day of September A. D. 1923.

D. A. Valentine, Clerk of the Supreme Court of the State of Kansas. [Seal Supreme Court, State of Kansas.]

[fol. 53] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1923

No. 594

[Title omitted]

ORDER GRANTING CERTIORARI—Filed Nov. 26, 1923

On Petition for Writ of Certiorari to the Supreme Court of the State of Kansas

On consideration of the petition for a writ of certiorari herein to the Supreme Court of the State of Kansas, and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

November 26, 1923.